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No. 414

In the Supreme Court of the United States

OCTOBER TERM, 1951

SAMUEL MANDEL, ADMINISTRATOR OF THE ESTATE OF ROBERT WILLIE DILLEHAY, JR., DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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The court below has held (191 F. 2d 164) that recovery may not be had under the Public Vessels Act for the death in the service of his ship of a civil-service employee, serving as a member of the civilian component of the crew of a public vessel of the Army Transport Service engaged in warlike operations in the presence of the enemy. In *Feres* v. *United States*, 340 U.S. 135, this Court held that recovery for service-incident death, injury, or ill-

ness of military-service employees may not be had under the Federal Tort Claims Act. The question of whether the same rule applies to recovery for similar service-incident death, injury, or illness of civil-service employees serving on public vessels remains open and has given rise to divergent views in the lower federal courts. In addition to the instant case, recovery has been denied by the Court of Appeals for the Second Circuit in *Johansen* v. *United States*, 191 F. 2d 162 (in which a petition for a writ of certiorari has been filed, No. 401, this Term). We regard these decisions as correct. The question has been decided in precisely the opposite manner, however, by the Court of Appeals for the Fourth Circuit in *Johnson* v. *United States*, 186 F. 2d 120; cf. *United States* v. *Marine*, 155 F. 2d 456.[1]

The question is of undoubted importance. Civil-service crew members employed on public vessels of the United States, unlike those on government

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[1] We do not regard *United States* v. *Loyola*, 161 F. 2d 126 (C.A. 9), as necessarily conflicting. There the Government argued successfully that, while the court had jurisdiction under the Public Vessels Act to determine the existence of a cause of action, the libelant had no cause of action for maintenance. Cf. *Feres*, *supra*, at pp. 140-141. The existence of a cause of action was precluded both because libelant had refused Government medical treatment and also because, although he forfeited compensation during such refusal, his fundamental right to compensation still precluded recovery. Since our contention that refusal of treatment precluded recovery was upheld, the court, correctly in our view, had no occasion to reach the question of whether libelant, although he had forfeited his compensation right, might nonetheless be precluded from recovery by his basic right to compensation.

merchant vessels operated by the Maritime Administration and its predecessors, the Shipping Board and the War Shipping Administration, are entitled to the benefits of the Federal Employees' Compensation Act for service-incident illness, injury, or death.[2] Such public vessel seamen, all but an insignificant number of whom are employed by the armed services as members of the civilian component of the crews of hospital ships, troop transports, and similar vessels, are not seamen in the ordinary sense of merchant seamen any more than are the members of the military component of the same crews. They are ordinary crew members of military vessels, frequently operating in the presence of the enemy, and are regular government employees entitled to all the benefits of the retirement, paid leave, disability, and death compensation statutes applicable to other members of the civil and military service. Public vessel seamen, if allowed both the right of

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[2] Merchant vessel seamen employed by the Maritime Commission and the Shipping Board were excluded from the benefits of the Federal Employees' Compensation Act under decisions of the Comptroller General founded on the view, ultimately upheld by this Court in *Johnson* v. *U. S. Fleet Corporation*, 280 U.S. 320, that merchant seamen employed by the United States have their exclusive recovery against the United States for illness, injury, or death under the Suits in Admiralty Act. See cases collected in *Gibbs* v. *United States*, 94 F. Supp. 586, 589, fn. 9 (N. D. Calif.) and referred to in the lower court opinion (fn. 15, 191 F. 2d at 168). Merchant vessel seamen of the War Shipping Administration and the present National Shipping Authority have the same status by reason of the Clarification Act (57 Stat. 45; 50 U.S.C. App. 1291(a)).

recovery by suit, which is given government-employed merchant seamen, and the right to compensation benefits, which is given regular military and civil-service employees of the Government, would enjoy a privileged position far superior not only to military-service employees but also to merchant seamen, both government and private alike, who have only the right of suit but enjoy no right to compensation. Equally important, as pointed out by the court below (191 F. 2d at 167), is the security aspect of permitting recovery by suit for service-incident injuries of public vessel seamen of the armed services.

While we thus regard the decision of the court below as correct, we believe that the conflict among the circuits and the importance of the question call for an authoritative decision by this Court. We therefore do not oppose the granting of the petition.[3]

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1951.

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[3] Nor, as stated in a separate memorandum being submitted simultaneously herewith, do we oppose the granting of the petition in the *Johansen* case, No. 401, this Term.

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